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<b>UNITED STATES DISTRICT COURT</b> <b>DEC 18</b> <b>DISTRICT OF NEVADA</b>	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY	DEPUTY

MICHAEL REEVES

DEPUTY

3:04-cv-0716-RLH (VPC)

Plaintiff,

vs.

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

STATE OF NEVADA, *et al.*,

Defendants.

December 18, 2007

This Report and Recommendation is made to Roger L. Hunt, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss (#47). Plaintiff opposed (#63) and defendants did not reply. The court has thoroughly reviewed the record and the motion and recommends that defendants' motion to dismiss (#47) be granted.

**I. HISTORY & PROCEDURAL BACKGROUND**

Plaintiff Michael Reeves ("plaintiff"), acting *in pro se*, is a prisoner incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), formerly at Ely State Prison ("ESP") (#7). On or about February 27, 2006, plaintiff was transferred temporarily to the custody of the State of Illinois pursuant to the Interstate Agreement of Detainers to await trial on charges in Illinois (#32). Plaintiff brings his complaint pursuant to 42 U.S.C. § 1983, alleging that prison officials violated his Eighth Amendment right prohibiting cruel and unusual punishment because the defendants denied him requested medical treatment. *Id.* Plaintiff names as defendants the State of Nevada; Ted D'Amico, NDOC Medical Director; John Doe, "Doctor Ely Prison"; and E. K. McDaniel, ESP Warden. *Id.*<sup>1</sup>

<sup>1</sup> Plaintiff filed a motion to proceed *in forma pauperis* on December 6, 2004 (#1). On April 14, 2005, the court granted plaintiff's motion (#5) and filed plaintiff's original complaint (#6). On April 27, 2005, plaintiff filed an amended complaint (#7). The court subsequently dismissed plaintiff's count III (#24 and #31).

1 This case has a tortured procedural history, some of which the court has already set out  
 2 in prior orders (#45 and #62). The court will not rehash the history here except as necessary to  
 3 the pending motion to dismiss. On August 6, 2006, defendants filed a motion to dismiss (#34).  
 4 In its February 14, 2007 report and recommendation, this court noted that plaintiff had not  
 5 received certain court orders due to clerical errors, and denied defendants' motion to dismiss  
 6 based on these errors. *Id.* However, this court stated:

7 Although the court does not address the defendants motion to  
 8 dismiss on its merits, the court believes that the defendants'  
 9 motion may contain valid arguments. As such, while the court  
 10 denies the defendants' motion to dismiss, it grants defendants  
 11 leave to re-file its motion after defendants submit the plaintiff's  
 12 current address to the court.

13 *Id.*<sup>2</sup>

14 Defendants complied with this court's order regarding plaintiff's address and inmate  
 15 number (#46), and re-filed their motion to dismiss (#47). The court issued a *Klinge* order on  
 16 March 12, 2007, notifying plaintiff of his obligations in responding to a dispositive motion (#49).  
 17 Instead of filing an opposition to defendants' motion to dismiss, on April 11, 2007, plaintiff filed  
 18 a motion for a continuance (#52) and motion for appointment of counsel (#53). The court denied  
 19 both motions after a hearing on June 4, 2007, and ordered plaintiff to file a motion in opposition  
 20 to defendants' motion to dismiss (#62). Plaintiff filed his opposition on June 11, 2007 (#63).<sup>3</sup>

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21 <sup>2</sup> The District Court affirmed and adopted this court's report and recommendation on March 12, 2007  
 22 (#50).

23 <sup>3</sup> Unfortunately, despite defendants' prompt submission of plaintiff correct Illinois address and  
 24 inmate number in February 2007, plaintiff's address was not changed in the court's electronic system. Once  
 25 again, the court's *Klinge* order was sent to an incorrect address. Thereafter, the Massac County Detention  
 26 Center in Illinois sent this court a letter with plaintiff's correct address, but with an incorrect inmate number  
 27 (#51). Because this incorrect number was entered into the court's system instead of the correct one  
 28 defendants had provided, further problems sending orders to plaintiff in Illinois ensued (#59, #60, and #61).  
 The problem was eventually resolved.

Although much of the delay in this case can be attributed to this court's errors and defendants' errors,  
 the court notes that plaintiff also has an obligation to inform the court of his whereabouts. Pursuant to the  
 Local Rules of Special Proceedings and Appeals, a prisoner has an obligation to "immediately file with the  
 court written notification of any change of address. The notification must include proof of service upon each  
 opposing party or the party's attorney. Failure to comply with this rule may result in dismissal of the action  
 with prejudice." LSR 2-2. Plaintiff did initially inform the court of his move to the Massac County  
 Detention Center in February 2006 (#32). Plaintiff claims that he sent a second change of address notice in

1 The Court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the  
 2 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff  
 3 the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th  
 4 Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

## 5 II. DISCUSSION & ANALYSIS

### 6 A. Discussion

#### 7 1. Motion to Dismiss Standard

8 When considering a motion to dismiss for failure to state a claim upon which relief can  
 9 be granted, all material allegations in the complaint are accepted as true and are construed in the  
 10 light most favorable to the non-moving party. *Barnett v. Centoni*, 31 F.3d 815, 816 (9th Cir.  
 11 1994); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). For the movant to succeed, it  
 12 must appear to a certainty that plaintiff will not be entitled to relief under the facts alleged in the  
 13 complaint. *Rothman v. Vedder Park Mgt.*, 912 F.2d 315, 316 (9th Cir. 1990). Under section  
 14 1983, plaintiff must allege that (1) defendants subjected him to the deprivation of a right,  
 15 privilege or immunity guaranteed by the U.S. Constitution or federal law, and (2) that the  
 16 defendants acted under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *see also*  
 17 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

### 18 B. Analysis

19 The court set out the above procedural history because plaintiff's opposition to  
 20 defendants' motion to dismiss focuses on these procedural issues and the merits of his complaint  
 21 rather than on the immunity argument in defendants' motion to dismiss (#63). Since plaintiff's  
 22 address and inmate number have been corrected, and plaintiff has received a copy of defendants'  
 23 motion to dismiss and an opportunity to respond, the court now addresses defendants' motion on  
 24 its merits.

25 Defendants argue that because plaintiff sued the State of Nevada and each defendant in

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 27 August 2006, when he was moved from Massac County Detention Center to Menard Correctional Center  
 28 (#63). Clearly, the court did not receive such notice. However, considering all of the errors in this case, and  
 the plaintiff's *pro se* status, the court gives the plaintiff the benefit of the doubt.

1 their official capacities, plaintiff's complaint must be dismissed because defendants are immune  
2 from prosecution pursuant to the Eleventh Amendment (#45). The Eleventh Amendment states:  
3 "The Judicial power of the United States shall not be construed to extend to any suit... against one  
4 of the United States by Citizens of another State..." U.S. Const. amend XI. The Supreme Court  
5 has held that a suit against a state official in his or her official capacity is not suit against that  
6 official, but rather a suit against the official's office; therefore, an official acting in his or her  
7 official capacity is not a "person" under section 1983. *Will v. Michigan Dept. of State Police*, 491  
8 U.S. 58, 71 (1989). Since the state and its officials are not considered "persons" within the  
9 meaning of section 1983, "they cannot be held liable under the statute for money damages." *Bank*  
10 *of Lake Tahoe v. Bank of America*, 318 F.3d 914, 918 (9th Cir. 2003). However, when a state  
11 official is sued in his official capacity for prospective injunctive relief, he is considered a "person"  
12 for the purposes of section 1983. *Doe v. Lawrence Livermore Nat. Laboratory*, 131 F.3d 836,  
13 839 (9th Cir. 1997).

14 In his amended complaint, plaintiff names each defendant in his official capacity, rather  
15 than in his individual capacity (#7). Plaintiff requests that the defendants pay him "in excess of  
16 \$10,000," as well as all costs incurred in bringing the complaint. *Id.* It is clear that defendants  
17 cannot be sued in their official capacities for money damages. *Bank of Lake Tahoe*, 318 F.3d at  
18 918. Plaintiff also seeks prospective injunctive relief in that he requests an order allowing him  
19 to "see a doctor outside the Nevada Dept. of Corrections for a second opinion" (#7). While  
20 defendants can be sued for injunctive relief in their official capacities, plaintiff is housed  
21 indefinitely in Illinois awaiting trial; thus, his request for injunctive relief is moot.

22 However, because plaintiff is acting *in pro se*, he is granted leave to amend his complaint  
23 to correct its deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (where a *pro se*  
24 plaintiff fails to state a claim, he or she "must be given leave to amend his or her complaint unless  
25 it is absolutely clear that the deficiencies of the complaint could not be cured by amendment").

### 26 III. CONCLUSION

27 Based on the foregoing and for good cause appearing, the court concludes that defendants  
28 are immune from suit for money damages in their official capacities and that plaintiff's request

1 for injunctive relief is moot. As such, the court recommends that defendants' motion to dismiss  
2 (#47) be **GRANTED**.

3 The parties are advised:

4 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,  
5 the parties may file specific written objections to this report and recommendation within ten days  
6 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
7 Recommendation" and should be accompanied by points and authorities for consideration by the  
8 District Court.

9 2. This report and recommendation is not an appealable order and any notice of appeal  
10 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's  
11 judgment.

12 **IV. RECOMMENDATION**

13 **IT IS THEREFORE RECOMMENDED** that defendants' motion to dismiss (#47) be  
14 **GRANTED**. Should the District Court approve and adopt this court's report and  
15 recommendation, plaintiff shall file his amended complaint within fifteen days of the District  
16 Court's order.

17 **DATED:** December 18, 2007.

18   
19 **UNITED STATES MAGISTRATE JUDGE**  
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